STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of the Complaint of the
CARRIER CREEK DRAIN DRAINAGE DISTRICT
for condemnation of private property for
drainage purposes in Eaton County, Michigan.

APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130125
Court of Appeals Docket No. 255609

Eaton County Circuit Court
Lower Court File No. 03-67-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

ECHO 45, L.L.C.,

Defendant-Appellant.

130125

Supreme Court Docket No. 130126
Court of Appeals Docket No. 255610

Eaton County Circuit Court
Lower Court File No. 03-68-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant,

and

STANDARD FEDERAL BANK,

Defendant.

Supreme Court Docket No. 130127
Court of Appeals Docket No. 255611

Eaton County Circuit Court
Lower Court File No. 03-69-CC
Hon. Thomas S. Eveland

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NOW COMES Plaintiff-Appellee CARRIER CREEK DRAIN DRAINAGE DISTRICT, by and through its attorneys, HUBBARD, FOX, THOMAS, WHITE & BENGTSON, P.C., and for its Response in Opposition to the Real Property Law Section of the State Bar of Michigan's Motion for Leave to File an Amicus Curiae Brief Supporting Appellants' Application for Leave to Appeal says as follows:

1. In response to paragraph 1, Plaintiff-Appellee admits that the Real Property Law Section is a voluntary membership society of the State Bar of Michigan open to all members of the State Bar of Michigan, whose stated mission is as follows:

> The Real Property Law Section of the State Bar of Michigan provides education and information about current real property issues through meetings, seminars, this site, pro bono service programs, and quarterly publication of a journal. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan. (See Real Property Law Section Mission Statement published at http://www.michbar.org/realproperty/mission.cfm.)

Further answering, Plaintiff-Appellee denies that the proposed Brief Amicus Curiae provides "information about current issues in real property law." Rather, it is clear that the Section is engaging in advocacy, and such advocacy is not necessarily reflective of a majority of the members of the Real Property Law Section, who were not provided the opportunity to vote on this issue.

The Section did not state whether the Michigan State Bar has a position on this issue. The Michigan State Bar Bylaws – Article VIII states in pertinent part:

> Section 9 – Conditions for Public Advocacy
> (1) A Section or entity of the State Bar that publicly advocates a public policy position on a matter must include the following information in its written communications to any external entity concerning the public policy position:
> (a) If the State Bar has no position on the matter, a statement that the position expressed is that of the State Bar entity only, and that the State Bar has no position on the matter.
> (b) If the State Bar has a position on the matter, a statement of the State Bar entity's position and a statement of the position of the State Bar.

By failing to advise of the State Bar's position, the Section has violated the Michigan State Bar Bylaws with this Motion and Brief. The Section may also have violated Supreme Court Administrative Order 2004-1. At the very least, under MRPC 3.3 ("Candor Toward the Tribunal") the attorneys submitting the Motion and Brief had the duty to disclose to this Court whether the State Bar has taken a position. On this basis, the Motion should be denied and the Brief should be withdrawn.

2. Plaintiff-Appellee admits that this case is governed by the provisions of the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51, *et seq.* The applicable section of the UCPA at issue in this case – MCL 213.55(3) – speaks for itself:

> If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency...within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later... If an owner fails to file a timely written claim under this subsection, the claim is barred.

3. Plaintiff-Appellee denies that the Section's recitation of facts is complete. Plaintiff-Appellee admits that Defendant Echo 45, LLC did not submit a written claim for the possibility of rezoning. However, the Section fails to note that Defendant Echo 45 had no basis whatsoever for this claim.

Defendant Echo 45's appraiser opined that, although the subject property was zoned residential, it should be valued as office use, resulting in significant damage to the remainder after the taking. However, discovery revealed that site plans predicated upon office zoning were never prepared, a rezoning was never actually sought, and Defendant's appraiser never inquired of any county or local official regarding the possibility of rezoning.[1]

Plaintiff's Motion in Limine was brought in part under MCL 213.55(3) because Defendant Echo 45 had failed to submit a written claim for this item of property or compensable damage, but the Motion was also brought because the possibility of such a rezoning was too remote and speculative in this case. The trial court therefore properly held that the Defendant Echo 45 was precluded from claiming damages arising from a hypothetical rezoning

[1] See Brief and excerpted transcript of Michael Eyde deposition attached to Plaintiff's Brief in Support of Motion Barring Unpreserved Claims & Motion in Limine, Appendix 2 to Response to Application. See also Trial Transcript, Appendix 1 to Response to Application, Vol IV, pp 126-127.

classification. (See Opinion dated September 17, 2003, and Order granting Motion in Limine dated September 30, 2003, Appendix G and H to Defendants-Appellants' Application.)

Even after the trial court's ruling, Defendant Echo 45 was allowed to present offers of proof at the bench trial regarding the possibility of rezoning. Defendant's owner and Defendant's appraiser both testified that office use would be the highest and best use of the property. (Trial Transcript, Vol V, pp 69-70; and Vol IV, pp 124-127.) However, neither witness testified at trial or deposition that any effort had been made to get the property rezoned, and the testimony by Defendants-Appellants' appraiser shows that the possibility of rezoning was wholly speculative:

> Q: And did you do any investigation in terms of checking with any formal governmental officials to determine if the property could be rezoned to professional office?
>
> A: No. (Trial Transcript, Vol IV, pp 126-127.)

The Court of Appeals affirmed the decision of the trial court excluding the possibility of rezoning claim, finding all of Defendants-Appellants' arguments to the contrary to be "without merit." This is *not* a case, therefore, of a landowner with a legitimate possibility of rezoning claim that was otherwise precluded by the time limits of MCL 213.55(3).[2]

4. Plaintiff-Appellee denies that the lower courts "have incorrectly analyzed the issue in this case," or that they have "confus[ed] the various factors that contribute to land's value with distinct 'items of property or damage' under the UCPA." The Court of Appeals Opinion in this case neither "alters the UCPA's requirements" nor "disrupts the condemnation

[2] See *Hartland Twp* v *Rodd*, 189 Mich App 591, 597-598 (1991): "The record establishes that defendant never sought rezoning of the parcel... The possibility of a zoning change was far too remote and speculative to be a proper consideration for valuing the parcel."

process." Rather, the Opinion interpreted the "plain and ordinary meaning" of the words in the statute to include the increased value associated with the possible zoning change.

As the Section points out in its proposed Brief, MCL 213.51(i) broadly defines the term "property" for purposes of the Uniform Condemnation Procedures Act: "'Property'" means land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights." Yet, in the same Brief, the Section incongruously argues that a zoning classification is not an item of property (although it admits that other types of intangible property rights *are* included, such as going concern and business interruption damages – see the Section's proposed Brief, p 16). Under our condemnation laws, Michigan landowners are not allowed to have it both ways: They cannot have a broad interpretation of property for maximum compensation, and a narrow interpretation of property for purposes of a landowner's duty to provide notice of items missed.

5. Plaintiff-Appellee denies that the Real Property Law Section provides unique information or perspective on the issues in this case. Instead, they merely seek to bolster the arguments already advanced by Defendants-Appellants. Furthermore, Plaintiff-Appellee denies that the position set forth in the Section's Motion and Brief are reflective of the position of the membership of the Real Property Law Section, or that of the State Bar. Plaintiff-Appellee notes that all of the attorneys who signed the Section's Motion and Brief – Jerome P. Pesick, David E. Pierson, Jason C. Long and Ronald E. Reynolds – specialize in representation of landowners in condemnation cases. They have a vested interest in seeing to it that the admittedly restrictive measures set forth in MCL 213.55(3) are "softened" by this Court.

In fact, it should be recognized that the Section's argument is fundamentally against the statute itself. And the reason these attorneys attempt to undermine the statute is set forth on Page

15 of the Section's proposed Brief: The notice of items missed directly relates to the amount of attorney fees recoverable in condemnation actions. MCL 213.66(3) provides that landowners are entitled to attorney fees in the maximum amount of 1/3 of the difference between the amount of the good faith offer and the ultimate award of just compensation. MCL 213.55(3) states that, if a landowner submits a list of items missed and the agency then makes an offer for those items, then the maximum amount of attorney fees is calculated using the revised offer. Therefore, it would work to the landowner's (and their attorneys') best advantage to not be required to list items of property missed, but instead to lay in wait and spring claims of such items at the time of trial, providing maximum recovery.

This "trial by ambush" strategy, though, is exactly what the Legislature sought to remedy with the 1996 amendment to MCL 213.55(3). There are certain characteristics of property only known, or best known, by the owner of such property. Those particular characteristics include the reasonable possibility of a change in zoning classification, just as they include such things as possible oil reserves, water resources, fixtures, going concern and business interruption. The legislature recognized this particular knowledge by the owner, and sought to avoid a surprised increase in costs to the condemning agency and artificially inflated attorney fees, both of which would ultimately be paid for by taxpayers. To allow the interpretation of the statute as Defendants-Appellants and the Real Property Law Section suggests would be to impermissibly enrich the landowner at the public's expense.[3]

[3] "... Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual." M Civ JI 90.05

6. This Motion was filed over ten weeks after the Section's Report on Public Policy Position was issued. There is no reasonable excuse for the delay in filing, nor is there any indication of the State Bar of Michigan's position on this issue.

WHEREFORE, Plaintiff-Appellee respectfully requests that the Court deny the Real Property Law Section's Motion for Leave to File an Amicus Curiae Brief Supporting Appellant's Application for Leave to Appeal.

Respectfully submitted,

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

May 1, 2006 BY: _____

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